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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1765

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

v.

GEORGE E. JONES, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

v.

WILLIE A. GRAHAM, and DIRECTOR OF OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR

Respondents.

BRIEF OF RESPONDENT GEORGE E. JONES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The foundry is an essential part of a shipbuilding operation. Respondent, George E. Jones, is employed in the foundry of the largest new shipbuilder in the United States and is

charged with the responsibility of maintaining the machinery in the foundry in working order. The question presented is whether such an employee is engaged in maritime employment and/or is a shipbuilder with in the meaning of Section 2 (3) of the Longshoremen's and Harbor Workers' Compensation Act?

STATEMENT OF THE CASE

George E. Jones is employed by the Newport News Shipbuilding and Dry Dock Company, hereinafter "Newport News Shipbuilding." Jones has been employed by Newport News Shipbuilding for over 25 years; the last four or five of which have been spent in the foundry.

Basically, the foundry makes castings for the repair and building of ships to include such items as mistletube castings, elbows, T's, valves andstern frames. Stern frames, for example, are among the first and most basic items made and installed in the process of building a ship. The foundry also produces HY80, one of the hardest metals, for use in the construction of the new Trident submarine. The foundry and the pattern shop make up one division of the Shipyard which is headed by one individual. The pattern shop obviously furnishes the foundry the patterns necessary t' the construction of the molds, etc., for pouring castings and other items made in the foundry.

The foundry is an integral part of shipbuilding and ship repair and is geographically and functionally connected to the machine shops , receiving, warehouses, fabricating and the ship's berthing and dry dock areas. Castings destined for the waterfront for machining and/or installation aboard ship go by truck and flat car via the roadway and railroad tracks which connect the foundry to all parts of the Shipyard. While the actual distance of the foundry is approximately two and a half

blocks or three thousand feet from the water's edge, the foundry 's integration in the shipbuilding process prompted the Administrative Law Judge to make the following remarks:

> For instance, the Pattern Shop sends the Foundry patterns for making molds for its castings. After the castings are made they are stored before being installed on the vessel or brought to the Machine Shop for additional machining before installation. The maintenance division, in which Claimant works, reflects this integration, as its employees work on machinery all over the Shipyard. Although several public roads intersect the premises, it is possible to walk from the Foundry, which is one of the buildings furthest from the water's edge without leaving the employer's premises.

The essential nature of the foundry to the shipbuilding operation was conceded by a company witness.

Q "Do you know, Mr. Sawyer, whether the work done by the foundry is an essential part of building an ship?"

A "Yes, sir."

Q "In other words, does a ship need a -- does a ship-yard need a foundry or does it need to hire the work done by somebody?"

A "That's correct."

Q "That work needs to be done by a shipyard?"

A "It needs to be done."

Q "So that the foundry operation, you would testify, I take it, is an essential part of the shipbuilding operation of the Newport News Shipbuilding and Dry Dock Company?"

A "I would say it's a part of Shipbuilding and Dry Dock Company."

Q "Well, it's necessary. I believe you said that."

A "It's necessary."

(T-105)

In addition to the items made in the foundry for use by Newport News Shipbuilding, the foundry also produces other items for sale to other companies through its wholly owned subsidiary. These other items may or may not be ship-related. Although the amount of ship-related work fluctuates with the work load, approximately 27 percent of the work performed in the foundry on the day George Jones was hurt was directly related to shipbuilding and ship repair work.

Jones carried the rate of a first class mechanic and his job in the foundry consisted of oiling and greasing and generally maintaining the equipment in operable fashion.

Q "Now, the oilers would oil and grease all of the equipment and machinery in the foundry, wouldn't they?"

A "That is correct."

Q "And, of course, it would be perfectly apparent that, if a machine isn't oiled and greased, it won't function?"

A "That's correct."

(T-93)

Based on these facts the Administator Law Judge found that:

> Claimant's task of maintaining in operating order, machinery necessary for continued formation of essential parts for ship repair and new ship construction, is an essential part of Employer's maritime building operations.

The Benefits Review Board specifically affirmed that finding and noted:

> This Board has previously held a shipyard worker injured in the course of maintaining equipment to be engaged in "maritime employment" as a shipbuilder when such equipment was utilized in the employer's shipbuilding and repairing operations. *Kininess v. Alabama Dry Dock and Shipbuilding Company*, 4 BRBS 13, BRB No. 75-275 (May 18, 1976).

Based on these facts the Fourth Circuit held that "Jones's maintenance work was as essential to the utilization of machinery as the work of machine operators." Since in the Fourth Circuit view "Jones's maintenance was essential to keeping the shipyard machineries in working order for the construction of ships" the Court concluded that Jones was a shipbuilder within the meaning of the Act.

Petitioner now asks this Court to reverse the unanimous determinations of three reviewing tribunals.

REASONS FOR DENYING THE WRIT

THE COURT SHOULD NOT GRANT A WRIT WHERE ALL OF .THE REVIEWING COURTS HAVE ENUNCIATED ESSENTIALLY THE SAME PRINCIPLE WHICH IS TO BE APPLIED IN DETERMINING WHETHER AN INDIVIDUAL IS ENGAGED IN SHIPBUILDING OR SHIP REPAIR. THIS COURT SHOULD NOT BURDEN ITSELF WITH APPLYING THE APPLICABLE LEGAL PRINCIPLE TO VARIOUS FRACTUAL DETERMINATIONS.

As pointed out in the brief of the Respondent in the companion case, each reviewing court that has dealt with attempting to define "shipbuilder" and "ship repairman" has concentrated its inquiry on determining whether the activity of the employee in question was "an integral step in the process,"[1] was an "integral part" of the shipbuilding operations [2] or "were directly involved" [3] or some similar inquiry. In point of fact this Court held that a checker was a longshoremen because his task was "an integral part of the unloading process . . ." *Northeast Marine Terminal Co. v. Caputo*,. 432 U.S. 249, 271 (1977).

What the Petitioners complain about as being an inconsistent position of the Circuit Courts and Benefits Review Board and the Administrative Law Judges is really an application of this now uniform principle to the various factual situations which are raised in the Act. There will be a myriad of circumstances in which an individual is working in a shipyard, either as a shipbuilder or a ship repairman. So long as the law is that the person's employment must be an integral part or directly involved or similar test phrase, then the necessary guidance has been accomplished and this Court should not make the mistake of reviewing the application of that principle to certain factual determinations.

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[1] *Stockman v. John T. Clark & Sons of Boston*, 539 F.2d 264 (1st Cir. 1976)

[2] *Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976), *cert denied*, 97 S. Ct. (1977)

[3] *Jackson Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976)

The cases on which the Shipyard relies to demonstrate a conflict in circuits upon a proper analysis demonstrate no conflict whatsoever. In *Weyhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert denied*, 429 U.S. 865 (1976), the Ninth Circuit held that a "pondman" who sorted logs for a lumber mill was not engaged in maritime employment simply because the pond on which he was working was navigable.[4] This decision is clearly correct and the broad language about the employee's work having a significat relationship to "traditional maritime activity involving navigation and commerce on navigable waters" has no application to the instant case. This is especially true since shipbuilding, which is clearly covered, has not been considered a traditional maritime activity. *Thames Towboat Co. v. The Schooner Francis McDonald*, 254 U.S. 242 (1920); *Tucker v. Alexandroff* 183 U.S. 424 (1902) (a "vessel was, prior to launching, mere pieces of wood and iron and as much a land structure as a houe.")

As much as the Company would like to limit the application of the Act to "navigation and commerce," it is clear that the 1972 Amendment enlarged the coverage of the Act. *Northeast Marine Terminal Co. v. Caputo. supra* 263-64.

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[4]The Ninth Circuits's exposition of what was involved exposes the inapplicability of the case:

> The full significance of the Law Judge's reference to "the log pond" is more readily appreciated with an understanding of a Northwesterner's common knowledge of a sawmill's log pond operation. The "log pond" is a universal adjunct to a sawmill and is either: (1) an artificial lake or pond dug or banked in dry uplands and fed by well or imported water, or (2) a log boom or other type of partitioned area of a stream, bay or other self-supplying body of water. The "log pond" of either type is maintained and sued solely for the utilitarian flotation method of holding, sorting, balding, and ultimate guidance of saw logs to and upon sub-surface chain conveyors which carry the saw log out of the log pond into the mill's sawing operation.
>
> We find it illogical to think of a pondman's work and duties at or on an upland sawmill's log pond as "maritime employment" in the traditional sense.

Similarly Newport News Shipyard's reliance on *Dravo Corp. v. Banks*,. 567 F2d 593 (3d Cir. 1977) and *Jacksonville Shipyards, Inc. v. Perdue, supra*, is misplaced and establishes the point being made in this brief in opposition that what the Shipyard really wants this Court to do is to apply accepted principles to various factual situations. Both the Third Circuit and Fifth Circuit examined the employee's activity at the time he was hurt to determine whether it was an integral part of the shipbuilding process. In *Banks* the Third Circuit concluded that ice removal operations were not an intgral part of shipbuilding. In *Perdue* the Fifth Circuit determined that the dismantling of a fabrication shop in a disused marine facility in order to salvage steel for use in constructing a plant which would manufacture sandblasting equipment was not an integral part of a repairman's job.

Applying the "integral part" standard, the Fifth Circuit in the same case, concluded that another employee, Nulty, was entitled to the benefits of the Act when he was hurt in a fabrication shop some three hundred feet away from where the ship was berthed. At the time he was hurt Nulty was building a piece of woodwork to be on a ship which had been installed launched, but not yet commissioned. Similarly the Third Circuit applying these principles found coverage for an employee working in a fabrication shop on steel plates which were ultimately to be installed and used in a barge. *Bravo Corp. v. Maxin*, 545 F.2d 374 (3rd Cir. 1976).

Petitioner represents that "developing confusion" is apparent from the recent decisions in *Ingalls Shipbuilding Corporation v. Morgan*, 551 F.2d 61 (5th Cir. 1977), *cert denied*, 98 S. Court 508 (1977) and *Alford v. American Bridge Division, U.S. Steel Corporation*, 7 BRBS 484 (1978) and *Buller v. American Bridge Division, U.S. Steel Corporation*, 7

BRBS 481 (1978). To state the facts of each case puts the lie to the statement that these cases demonstrate either inconsistency or confusion. In *Morgan, supra,* the Fifth Circuit held that an employee who was killed while cleaning a steel plate which was being fabricated for installation in a ship was "directly involved in an ongoing shipbuilding operation." The standard applied by the Court certainly is consistent with that uniformly applied by every tribunal that has dealt with the issue.

The Benefits Review Board denied the benefits of the Act to a climant working as a welder for an employer which is in the steel fabrication business. The employer made

> . . . structural steel parts for everything from the Superdome in New Orleans, Louisiana, to component modules for vessels which were destined for incorporation into the final assembly of a vessel in New York or Virginia, to steel structures for bridges. The employer does not maintain, and has not maintained, a ship-building facility at its Orange, Texas, plant since 1965. The employer does not perform any aspect of shipbuilding other than the fabrication of component modules which are to be assembled, along with other modules, into a complete vessel by other companies in New York or Virginia. Employer does not have the capability or the facilities at its Orange, Texas, plant to perform the various stages required in construct-ing a vessel. *(Alford v. American Bridge Division, supra,* at 489)

No disparity is indicated by those decisions.

It might be said that since only 27 percent of the Foundry's machines were used for ship-related work on the day in question, that Jones is not entitled to coverage when he maintained the machines for non-ship related work. We think this Court's opinion in *Northeast Terminal* puts that issue to rest.

> Since it is clear that he would have been covered while unloading such a vessel, to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that congress intended to eliminate. (*Id.* at 274)

The problem posed by these cases is to define what a ship-builder and ship repairman are for purposes of coverage in the Act. All of the reviewing Courts and Administrative agencies have settled on a test which asks whether the employee's activity at the time he was injured was an "integral part" of the shipbuilding or ship repair process. That type of inquiry is obviously consistent with the Congressional intention to broaden the situs of coverage of this Act from navigable waters to land-based activities. The enunciation of this principle is also consistent with this Court's admonition, reemphasized in *North east Marine Terminal Co. v. Caputo, supra,* at 335, that the Act is to be liberally construed to favor injured workers. *Voris v. Eikel,* 346 U.S. 328, 333 (1953). Futhermore, the principle being applied by the reviewing tribunals is consistent with the statutory presumption that an individual claim comes within the Act's coverage, Title 33 U.S.C. 290 (a).

Also this Court must remember that the "integral part" standard has been established by the Benefits Review Board. This Court has long held that so long as there is a reasonable legal basis for the Board's conclusions they will not be disturbed on appeal. See *O'Leary v. Brown-Pacific-Maxin Inc.*, 340 U.S. 504, 508 (1951), *Cardillo v. Liberty Mutual Insurance Company,* 330 U.S. 469, 478-79 (1947).

CONCLUSION

For the reasons stated herein the Petition should be denied.

Respectfully submitted,

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